Supreme Court, U.S.
FILED
DEC 30 1992
OFFICE OF THE CLERK

No. 92-519 and 92-767

In The Supreme Court Of The United States

OCTOBER TERM, 1992

T.K. WETHERELL, et al., *Appellants*,
v.
MIGUEL DeGRANDY, et al., *Appellees*.

UNITED STATES OF AMERICA, et al., *Appellants*,
v.
STATE OF FLORIDA, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Upon a trial under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the three-judge district court imposed a remedial districting plan for the Florida State House of Representatives. The questions presented are:

1. Whether the district court erred in rejecting the State's apportionment plan in which minority districts were not apportioned on the basis of total minority population.

2. Whether a substantial issue is presented for review when the district court, after a full review of evidence pertaining to the preconditions and the totality of the circumstances test under Thornburg v. Gingles, 478 U.S. 30 (1986), imposes a remedy which takes into account minority voting effectiveness.

3. Whether the abstention doctrine bars plaintiffs from asserting claims under the Voting Rights Act when no state court was pending and no state court has adjudicated those claims.

4. Whether the district court erred in imposing a remedial plan when the 1992 election was imminent and the State had failed to offer a plan which fully remedied the dilution of the Hispanic vote in south Florida.

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MOTION TO DISMISS OR AFFIRM

INTRODUCTION

This case was brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The three-judge district court reviewed extensive testimony concerning voting history, electoral success and other factors included in the "totality of the circumstances" test and properly applied the vote dilution analysis established by this Court in Thornburg v. Gingles, 478 U.S. 30 (1986). With elections imminent, the court imposed a remedial plan for the Florida House of Representatives.

The Appellants do not challenge the lower court's findings regarding minority group cohesiveness or racially polarized voting -- two of the three threshold findings necessary to establish Section 2 liability. Rather, they question only the lower court's finding that the Hispanic population in south Florida is sufficiently large to constitute an effective voting majority in eleven state House Districts, as opposed to the nine established by Appellants' plan.

Additionally, the Appellants seek to avoid the consequences of the lower court's Section 2 liability findings by arguing (1) that the Appellees' federal rights should have been adjudicated in another forum, (2) that there were procedural defects in the remedial phase of the hearing, and (3) that a "proportional" allocation of House seats (based on citizen voting age population, rather than total population, in Dade County) provides an affirmative defense in a Section 2 case. These arguments present no substantial questions and, no "clearly erroneous" findings having been identified,[1] plenary consideration by this Court is unwarranted. This appeal should, therefore, be summarily dismissed or affirmed, and the lower court's remedial order apportioning the Florida House of Representatives should be implemented.[2]

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[1] In Gingles, this Court "reaffirm[ed] our view that the clearly erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." 478 U.S. at 79.

[2] By way of this Motion to Dismiss or Affirm, the DeGrandy Appellees also respond to the Jurisdictional Statement of the United States in United States v. State of Florida, No. 92-767. Except as otherwise noted, the DeGrandy Appellees concur with the presentation of issues by the United States in its Jurisdictional Statement.

STATEMENT OF THE CASE

A. The State Reapportionment Process.

Florida's Constitution establishes a unique role for its Supreme Court in the reapportionment[3] process. That constitution directs the state legislature to reapportion Florida's congressional delegation and the state House of Representatives and Senate and establishes a process to achieve that result.[4] Fla. Const. art. III, § 16. If the legislature fails to pass a joint resolution of state legislative apportionment in regular session, it must meet in special session. Failing passage of a plan in special session, the Florida Supreme Court must assume a legislative role and adopt its own plan. Fla. Const. art. III, § 16(f).

If the Legislature does pass a joint resolution of apportionment, the enactment process requires that joint resolution to be submitted to the Florida Supreme Court for a special 30-day review.[5] The court does not resolve dis-

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[3] Although "reapportionment" technically refers to the process of distributing seats in the United States House of Representatives among the states, the Florida Constitution uses the word "apportionment" to describe its process of determining the number of legislative seats and establishing district lines. The court below used the term "reapportionment." This Motion adopts the terminology of the court below.

[4] The Florida Legislature failed to adopt a plan for congressional reapportionment, forcing the federal court to devise a plan which was adopted and implemented in the 1992 elections. The congressional plan has not been appealed. See DeGrandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992).

[5] The 30-day review is designated as a "declaratory judgment," but no evidence is taken, no cross-examination is permitted and the merits are decided solely on the basis of briefs and oral argument. As a

puted issues of fact or make factual findings. In prior reapportionment cases, the Florida Supreme Court has established that challenges to an apportionment plan under Section 2 of the Voting Rights Act must be conducted in separate trial proceedings. In re Apportionment Law, Senate Joint Resolution No. 1305, 263 So. 2d 797, 808 (Fla. 1982). Once the court has conducted its facial, 30-day review and held the plan valid, the plan becomes effective under state law.[6]

B. The Federal Lawsuit.

On January 13, 1992 -- three months prior to any state proceedings -- the Appellees filed suit in the United States District Court for the Northern District of Florida. App. 9a.[7] Appellees' original claim alleged that the Florida Legislature would not pass a legislative plan meeting all constitutional and statutory requirements sufficiently in advance of the 1992 elections to afford Appellees the opportunity to participate fully in those elections and to mount effective campaigns.[8] Accordingly, Appellees requested that the federal court accept jurisdiction, establish a scheduling order and, thereafter, if necessary, prepare congressional and state legislative plans of apportionment that would become effective in June, 1992. Appellees did not request the federal court to enjoin the state legislature's effort to pass apportionment plans. Rather, Appellees requested that the federal court permit the legislature to proceed, but simultaneously to develop reapportionment plans in the event that the legislative process did not produce acceptable plans sufficiently in advance of the qualifying date for the 1992 elections. The federal court dismissed Appellees' original complaint without prejudice, deferring to the legislative process and to the Appellants' assertions that congressional and legislative plans would be adopted and in place well in advance of the qualifying deadline. App. 10a.

The regular session of the state Legislature ended in March 1992, without passage of any apportionment plan. App. 12a. As a result, Appellees filed their second amended complaint, renewing their request that the federal court take jurisdiction and ensure that some apportionment plan, whether legislative or court-ordered, be in place in advance of the 1992 elections.[9] The court denied Appellants' renewed motions to dismiss, accepted jurisdiction, and established a scheduling order whereby congressional and legislative plans would be submitted by May 29, 1992. App. 12a. In entering the scheduling order, the three-judge

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result, this state court process is referred to as a "facial review." In re Apportionment Law, Senate Joint Resolution No. 1305, 263 So. 2d 797, 808 (Fla. 1982). Unlike every other Florida law, state legislative reapportionment is not subject to a gubernatorial veto. See Fla. Const. art. III, § 16.

[6] Upon conclusion of the state court review, the plan is subject to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c) and 28 C.F.R. § 51.1, et seq. Accordingly, the State of Florida did not submit the plan for preclearance until after the review by the Florida Supreme Court.

[7] "App." references are made to the Appellants' Appendix.

[8] The DeGrandy Appellees are comprised of African-American, Hispanic and Anglo voters, legislators and prospective candidates for office who reside throughout the state.

[9] The Second Amended Complaint contained claims under Section 2 and the Fourteenth Amendment. App. 10a.

District Court announced that it was not enjoining any state proceedings or any effort by the state legislature to adopt apportionment plans. Id.

Two weeks after acceptance of jurisdiction by the federal court, the Florida Legislature passed Senate Joint Resolution 2-G, reapportioning the state House of Representatives and the state Senate. Id. No congressional plan was passed. The federal court immediately delayed trial on state apportionment but maintained its schedule with respect to congressional redistricting. Id. On April 10, the Florida Supreme Court began its review of the Joint Resolution in accordance with the Florida constitutional provision. On May 13, 1992, the state supreme court declared the Joint Resolution "facially valid." App. 13a. On the same day, the federal court, in deference to the state court action, stayed all its proceedings concerning state legislative apportionment pending Section 5 preclearance. Id.

C. State Judicial Review Of The Joint Resolution.

During the state judicial review, both houses of the legislature contended that the Florida Supreme Court could not determine whether the legislative plan complied with Section 2 of the Voting Rights Act. The joint brief of the legislature argued:

> This Court's instant review cannot be dispositive of the ultimate Section 2 determination. Section 2 requires an "intensely local appraisal of the design and impact mechanism" and a "flexible, fact-intensive inquiry into the past and present reality of the political process" . . . an inquiry beyond the

> scope of this Court's Article III, Section 16 review.

Joint Brief of Legislature at 17.

The Florida Attorney General took the same position:

> A Section 2 challenge requires a detailed, complex factual inquiry into the underlying application of the redistricting plan. The question of whether the political processes are equally open depends on a searching and practical evaluation of the past and present reality and on a functional view of the political process. This determination is peculiarly dependent upon the facts of such case . . . A Section 2 claim for the purposes of this Court's jurisdiction is not a facial constitutional claim; therefore, any Section 2 implication is not properly before this Court in this proceeding.

Brief of Attorney General at 25.

In contrast, the Appellees urged the Florida Supreme Court to conduct a complete trial -- with testimony under oath and subject to cross examination -- to determine whether the Joint Resolution violated Section 2. Appellees also asserted that any attempt to determine the plan's compliance with the Voting Rights Act without evidentiary proceedings would be unconstitutional. Brief of DeGrandy at 9.

The Florida Supreme Court rejected the Appellees' request for an adjudication of their Section 2 claims, holding:

> It is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in Thornburg v. Gingles, within the time constraints of Article III, Section 16(c).

In re Senate Joint Resolution 2-G, 597 So. 2d 276, 282 (Fla. 1992). Because necessary fact-finding and factual analysis was impossible, the Court held that a Section 2 challenge would have to come at a later time:

> Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation . . .

Id. at 282. Thus, the Florida Supreme Court's conclusion that the Joint Resolution does not discriminate against minorities was expressly qualified by "the limitations of [its] review, including both time constraints and the unavailability of specific factual findings. . . ." Id. at 285. Accordingly, the court entered its decision without prejudice to a future Section 2 challenge:

> We acknowledge that any interested person should have the opportunity to attempt to prove that the Joint Resolution is invalid through a presentation of evidence in accordance with the Gingles analysis of the Voting Rights Act. Therefore, our holding is without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act.

Id. at 285-86.[10]

On April 6, 1992, pursuant to Fed. R. Civ. P. 53, the federal court appointed a Special Master to prepare or review plans for congressional and legislative reapportionment. App. 12a. On April 24, 1992, the Special Master appointed an expert to consider and evaluate the parties' congressional plans and began hearings on them. The evidence adduced at the hearings on congressional redistricting was extensive and largely concerned Section 2 evidentiary issues regarding the "totality of the circumstances" test, including, specifically, south Florida.[11] Thus, when the Florida Supreme Court entered its decision on May 13, the federal court had in place all machinery necessary to review the parties' proposed plans and, if necessary, to prepare court-drawn congressional and state legislative apportionment plans.

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[10] The Florida Supreme Court has at no time, either in its May 13 decision or thereafter, entered findings of fact concerning the standards applicable to a Section 2 claim under the Voting Rights Act. No subsequent state court action challenging the Joint Resolution under Section 2 of the Voting Rights Act has been brought.

[11] For a discussion of the evidentiary basis upon which the Special Master concluded that minority congressional districts would be necessary, see DeGrandy v. Wetherell, 794 F. Supp. 1076, 1078 (N.D. Fla. 1992). The findings regarding the "totality of the circumstances" elements in Dade County have been buttressed recently in Meek v. Metropolitan Dade County, Fla., No. 86-1820-Civ-Graham, 1992 WL 174506 (S.D. Fla., May 26, 1992), Meek v. Metropolitan Dade County, Fla., No. 86-1820-Civ, 1992 WL 259754 (S.D. Fla, Sept. 11, 1992).

D. Federal Court Proceedings – Section 2 Challenges To The Legislative Plan After Preclearance.

After the United States Attorney General precleared Florida's plan for the state House,[12] the DeGrandy Appellees moved, and were granted leave, to amend their complaint to include a Section 2 challenge to the precleared plan.[13] App. 14a-15a. On June 24, 1992, the Department of Justice filed a separate complaint challenging both the state House and state Senate plans under Section 2 of the Voting Rights Act. That action was consolidated with the amended DeGrandy complaint.

On June 26, 1992, the Florida Supreme Court modified the Florida Senate plan to meet the objections interposed by the Department of Justice and it became legally enforceable under state law. The appellees were allowed by the court to amend their complaint to add Section 2 challenges to the Florida Senate plan. App. 18a-19a.

[12] Dade County is not subject to Section 5 of the Voting Rights Act. Only five Florida counties are Collier, Hardee, Hendry, Hillsborough, and Monroe. 28 C.F.R. § 51, App.

[13] Despite the Florida Supreme Court's "facial review" of SJR 2-G and its determination that the plan "does not discriminate against minorities," the Department of Justice refused to preclear Florida's Senate plan under Section 5 of the Voting Rights Act. Under federal law, Florida's 1990 apportionment was "not effective as law until and unless it is precleared." McCain v. Lybrand, 465 U.S. 236 (1984).

E. The Section 2 Trial.

The three-judge court below divided the Section 2 trial regarding the legislative plan into a liability phase followed by a remedial phase. At the liability phase, the lower court determined that the Appellees had met all three of the Gingles preconditions,[14] as well as the totality of the circumstances test outlined by Gingles, and had established Section 2 liability.[15] App. 24a; App. 30a-55a.

In reaching its decision that the Hispanic community was sufficiently large to comprise a tenth and an eleventh House district, the court carefully examined the testimony of numerous experts regarding the percentage of voting age population necessary for Hispanics to have an equal opportunity to elect candidates of their choice. The court also examined the available evidence to locate within Dade County the residences of recent immigrants. App. 38a. The court concluded that, applying a 60% Hispanic voting age population ("VAP") guideline to localized demographic areas, this percentage concentration would allow for diminished citizenship levels as well as lower turnout and regis-

[14] The only precondition the Appellants challenge here is whether the Appellees proved that the Hispanic population group is sufficiently large to constitute a majority in two additional single-member state house districts.

[15] In Solomon v. Liberty County, Florida, 899 F.2d 1012 (11th Cir. 1990) (en banc) cert. denied, ___ U.S. ___, 111 S. Ct. 670 (1991), the Eleventh Circuit Court of Appeals divided evenly on the issue of whether Section 2 plaintiffs must make a showing beyond the three Gingles factors to establish liability. In the present case, the court below examined the "totality of the circumstances" in addition to the Gingles factors and concluded that under either analysis the Appellees had met their burden of establishing liability. App. 30a.

tration levels and would provide an appropriate opportunity for minority citi-zens to elect candidates of their choice.[16]

ARGUMENT

I. THE APPELLANTS' ASSERTION THAT THE STATE'S REAPPORTIONMENT PLAN ACHIEVES PROPORTIONALITY IS UNSUPPORTED BY THE RECORD.

The Appellants' instant affirmative defense of proportional representation was not pled by them pursuant to Fed. R. Civ. P. 8(c) and cannot be raised for the first time on appeal. Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291, 298 (5th Cir. 1979), reh'g denied, 601 F.2d 586, cert. denied sub nom. Claiborne Hardware Co. v. Henry, 444 U.S. 1074 (1980) (citations omitted).

On the merits, however, the lower court did not apply a "maximization" or proportional standard in its remedy. Rather, the three-judge panel considered extensive evidence pertaining to the Gingles threshold requirements, App. 30a-53a, and found that "[t]he record clearly established that Florida's minorities have borne the social, economic and political effects of . . . discrimination." App 53a. Thereafter, the lower court provided for House districts only where violations were found under Gingles. Accordingly, the court's remedy avoided either a maximization or a proportional representation approach.[17]

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[16] See Judge Vinson's concurring opinion criticizing the reliability of the Appellants' contrary citizenship analysis data. App. 74a.

[17] The DeGrandy complaint, which was quoted by the lower court, asserted that the legislature intentionally "fragment[ed] cohesive minority communities and otherwise impermissibly submerge[d] their right to vote." App. 20a-21a. The complaint and the trial centered not on the number of Hispanic representatives but on the division of adja-cent Hispanic communities in order to protect Anglo incumbents. The United States' Motion to Dismiss or Affirm confirms the adequacy and correctness of the district court's findings. In addition, the Appellees emphasize the extensive evidence used by the district court in this case. In addition to consideration of the trial testimony, the lower court incorporated by reference its previous findings (in the congressional trial) regarding the existence of the totality of the circumstances factors in south Florida. DeGrandy v. Wetherell, 794 F. Supp. 1076.

The Appellants make two very different arguments regarding their new proportional representation defense. First, they argue that citizen voting age population (CVAP) is the measure that should be used to determine proportionality. Second, they argue that the lower court's reme-dial districts are ineffective due to lower citizenship levels in the Hispanic community. The Appellees respond to these assertions in sequence.

With regard to the proper population measure, Florida, as does every other state in the Union, bases it reapportionment decisions on total population statistics. In the 1990 census, there were 1,574,143 Hispanics (12%) among Florida's total population of 12,937,926. If proportionality were relevant to any Section 2 claim, which it is not, these numbers would presumptively entitle Hispanics living in Florida to fourteen legislative seats in the 120-member Florida House of Representatives (12%). The DeGrandy Appellants sought a plan of reapportionment that would have produced eleven Hispanic majority house districts; SJR 2-G contained a plan that would have produced only nine Hispanic majority house districts. Despite the fact that the Appellees did not seek, and did not obtain, a proportional remedy of fourteen seats, the Appellants mistakenly argue that their nine-seat plan achieves proportionality.

Florida apportions its legislative seats on the basis of total population, and the districts were drawn based on total population in accordance with the prior holdings of this Court regarding one person, one vote. See Richardson v. Burns, 384 U.S. 73 (1966); Kirkpatrick v. Priesler, 394 U.S. 526 (1969); Wesberry v. Sanders, 376 U.S. 1 (1964). Legislative seats having been to the various areas of the state based on total population, the Appellants would have the Court employ a different population base (CVAP) for the purpose of analyzing their affirmative defense of proportional representation. By using different population bases, the effect is to treat Hispanic communities differently from Anglo communities, thereby intentionally minimizing the number of minority districts. While this Court has stopped short of requiring that the population base should always be total population, it has insisted on consistency in the use of a population base by a state. Kirkpatrick, 394 U.S. at 530-531.

The dual population base measure suggested by the Appellants would allow the Anglo community of south Florida to use the higher minority population to locate additional seats in that region of the state, but would prevent the Hispanic community from sharing in the benefit of those additional districts.[18] The discriminatory effect of the Appellants' proposal of two population bases is exemplified by considering a hypothetical state of five million people with 100 legislative seats. Two million of these

[18] A violation of the Voting Rights Act is established if a protected class has "less opportunity than other members of the electorate to participate in the political process and elect candidates of their choice." 42 U.S.C. § 1973. Obviously, using the dual population base measure of proportionality suggested by the Appellants provides white voters more electoral opportunities solely because of the presence of a minority population that is unable to vote.

people are located in the southern part of the state entitling that part of the state to forty seats. One million of the people in the southern region are members of the language minority; of that language minority, half are not eligible to vote but all of the language majority population in that area are eligible to vote.

If total population is used to reapportion and is also used as the measure of proportionality, then the Hispanic minority would not achieve proportional representation until they reached twenty seats. If, however, the Appellants' dual population base scheme is used, the Hispanic minority will have achieved proportionality at ten seats. The Anglo majority of the southern region of the state would get ten additional seats, solely because of the presence of the underage or non-citizen members of the Hispanic minority and the use of a dual population base. This result not only discriminates against the Hispanic minority but also against all voters elsewhere in the state.

As the Ninth Circuit Court of Appeals stated in Garza v. Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991):

> The purpose of redistricting is not only to protect the voting power of citizens; a co-equal goal is to ensure "equal representation for equal numbers of people." Kirkpatrick, 394 U.S. at 531. Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). . . . Since the whole concept of representation depends upon the ability of the people to

make their wishes known to their representatives, this right to petition is an important corollary right to the right to be represented. Non-citizens are entitled to various federal and local benefits, such as emergency medical care and pregnancy-related care provided by Los Angeles County . . . As such, they have a right to petition their government for services and to influence how their tax dollars are spent.

In this case, basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative.

Garza, 918 F.2d at 775 (citations omitted).

This Court, in Gingles, discussed in detail the legal significance of pro-portional minority candidates' success. The court below properly applied its instruction that proportional representation is not a defense to a Fifteenth Amendment violation nor to a Section 2 violation. See Gingles, 478 U.S. at 76 n.37, citing Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).[19]

[19] This Court in Gingles stated:

II. THE REMEDIAL DISTRICTS DRAWN BY THE COURT ARE CAPABLE OF ELECTING CANDIDATES OF THE MINORITY COMMUNITY'S CHOICE.

The Appellants' argument that the Hispanic community is not sufficiently large to constitute a voting age majority in eleven districts in south Florida is premised upon the assertion, rejected by the trial court, that Dr. William DeGrove's regression analysis conclusively proves that substantial portions of the voting age Hispanic population are non-citizens. Thus, their appeal is founded upon the mistaken belief that this Court should redetermine what they deem to be a mixed question of law and fact. To the contrary, this Court has repeatedly held in both White v. Regester, 412 U.S. 755 (1973), and Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985), that review in vote dilution cases is subject to the clearly erroneous standard accorded to factual findings pursuant to Fed. R. Civ. P. 52. Evidence of citizenship sub-mitted by Dr. DeGrove

> [T]he election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote," noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate. . . . The Senate Committee decided, instead, to "require an independent consideration of the record" [which] depends upon a searching practical evaluation of the "past and present reality."

Gingles, 478 U.S. at 75, citing, S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 208 (at 29).

was specifically rejected by the trial court as unreliable. This finding is not clearly erro-neous.[20]

In Ketchum v. Byrne, 740 F.2d 1398, 1411 (7th Cir. 1984), the Seventh Circuit approved the use of a greater voting age population to adjust for the presence of Hispanic non-citizens, or lower registration and voter turnout, in proposed minority districts.[21] The Ketchum approach of increasing the percentage of Hispanic voting age population to offset for the presence of non-citizens in Chicago was the same approach that the court below utilized to account for the presence of non-citizens, or diminished registration and voter turnout, in Dade County. App. 30a-40a.

The court below, in analyzing the House plans, used past election results and expert testimony in arriving at a generally effective voting age population percentage (60%) that reflected Hispanic voting strength in the particular

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[20] The court stated:

> Despite the lack of available data, the defendants presented estimates of Hispanic citizenship and attempted to apply them to individual districts. These estimates are unreliable. For example, William DeGrove's analysis was based on a somewhat unorthodox regression analysis methodology . . . [which] must be viewed with low confidence and with a large range of error.

App. 74a.

[21] Ketchum states that the term "effective majority" means 'a majority of the population substantial enough to allow group choice to be effective.' In the case of minority groups, the 'minority must constitute more than half of a district's population in order to obtain an effective electoral majority.'" Ketchum, 740 F.2d at 1410-411 n.13.

circumstances of south Florida.[22] App. 55a-57a; see also App. 58a n.46. Showing even more care and sophistication in applying this indicator to individual plans, the court located non-voting Hispanic populations in south Florida and required that the VAP for those areas be greater than 60% in order to compensate for the lower voting strength in those areas. App. 70a-71a.[23,24]

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[22] Cases cited by the Appellants for the proposition that "effective voting majority" must be shown in order to meet the "sufficiently large" test, are not applicable in this case because, based upon past election data, the court below found that "effective" voting majorities existed in the proposed Hispanic districts. The lower court's approach was based on evidence showing that, when the Hispanic voting age population exceeds 59% of an election district, the Hispanic community is able to elect candidates of its choice and overcome the effects of racial bloc voting. The panel rejected the proffered testimony of Dr. William DeGrove that, in the remedial districts, non-citizen voting age population reduced Hispanic majorities to below 50%. This testimony was not persuasive in light of the evidence of past electoral success of Hispanic candidates in the pro-posed districts under the illustrative plans.

[23] Indeed, this is the very reason that the DeGrandy remedial plan was selected over the second remedial plan of the Appellants. As noted by the court, "areas with high concentrations of recent Hispanic arrivals must have a VAP significantly higher than our 60% guideline level . . . Because these two 61 percent districts are located in areas with high concentrations of recent Hispanic arrivals, we find that these districts do not give Hispanics a reasonable opportunity to elect candidates of their choice." App. 70a.

[24] The district court had before it the statistics of past elections in south Florida involving Hispanic candidates. App. 45a-47a. The court also heard numerous experts; the testimony of Dr. Allan Lichtman and Dr. Dario Moreno was specifically cited by the court in its opinion. The Appellants also provided testimony regarding the proper level of VAP necessary to ensure that Hispanic voters could control a single member district. The trier of fact did not find the Appellants' expert testimony to be persuasive. This factual dispute is the real issue

In Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989), the court discussed the use of "effective voting majority" as the proper standard for measuring whether a minority group is sufficiently large. Because the court below used an analysis that took voting majority effectiveness into account, its decision is not in conflict with Romero.

The Appellants seek to persuade this Court that Congress intended to bar suits under Section 2 if proportionality has been achieved.[25] In fact, while Congress undoubtedly intended to remove a requirement of proportionality as a prerequisite for compliance with Section 2, it certainly did not intend to create a bar to minority group success. The proportionality defense was not factually developed before the court below and its offer at the appellate level should not district the Court from the lack of an evidentiary basis for such a claim. The court below did not discuss proportionality because it was not presented as a substantive defense. During the trial, it was a not an issue. The court followed the congressional intent established by Section 2 and omitted proportional considerations from its analysis.[26]

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defendant seeks to relitigate in this appeal.

[25] Proportionality considerations, if not barred by the statutory language of Section 2, would invariably revolve around such issues as the appropriate figure to use for the numerator in such equations: is it total population, voting age population, registered voters, citizen population, or citizen voting age population? In addition, a court would be faced with the geographic area to be considered: should the area be the entire state of Florida in which proportion should be measured, or a subdivision thereof? If a subdivision, which subdivision would be appropriate as a uniform rule?

[26] See App. 75a.

While the DeGrandy Appellees agree with the response of the United States that the relevant area in making a proportionality defense is the state of Florida, DeGrandy Appellees would also note that such a view is not necessary to recognize that the Appellants' attempt to confine the case to Dade County is totally arbitrary.[27] In fact, even SJR 2-G is not confined to Dade County. Although Dade borders three other counties (Monroe, Collier, and Broward), only the Broward County line is sacrosanct under SJR 2-G.[28]

Neither the Appellees nor the court confined itself to Dade County. If surrounding counties are added, it becomes clear that Appellants chose the only configuration and population base that would allow them to raise proportionality as a defense and then attempted to ignore adjacent minority population because it was on the other side of the county line.

The only case cited by the Appellants for the proposition that proportional representation is a bar to a Section 2 claim, Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo.

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[27] In rejecting the Appellants' proposed remedy, the district court noted that "[b]ecause the Florida House defendants arbitrarily confined its [sic] changes to Dade County, the House defendants' second remedial plan does not create eleven effective House districts which give Hispanics the potential to elect candidates of their choice." App. 69a.

[28] Whatever the genesis of this state policy of not crossing the Broward County line (Appellants' Jurisdictional Statement at 26), it is obviously recent and not consistently applied. The Senate Report accompanying the 1982 amendments to the Voting Rights Act noted that the tenuousness of a state policy that has the effect of diluting minority voting strength is a factor in the totality of the circumstances evaluation. Thornburg v. Gingles, 478 U.S. 30, 37 (1986).

1992), arose in a clearly distinguishable factual setting. In Nash, the court found a ten-year history of proportional representation, as well as a near certain likelihood that there would be proportional representation in the future. No such history was proven in south Florida because it simply does not exist.

III. THE ABSTENTION DOCTRINE HAS NO APPLICATION WHERE PLAINTIFFS SEEK REDRESS FOR VIOLATION OF A FEDERAL STATUTE IN FEDERAL COURT AND NO STATE COURT HAS ADJUDICATED THE CLAIM.

The Appellants' abstention argument is premised upon a confrontation between a federal court and a state court that never occurred. The record reflects that the Florida Supreme Court expressly refused to decide whether the House reapportionment plan complied with Section 2 of the Voting Rights Act.

State judicial review of a joint resolution of apportionment has always been, and remains, limited. The state Supreme Court describes the review as "facial" because it does not receive testimony or make findings of fact. Specific factual challenges to a plan of apportionment must be heard in subsequent proceedings, either in state or federal court. In re Apportionment Law, Senate Joint Resolution No. 1305, 263 So. 2d 797, 808 (Fla. 1982). Accordingly, the Florida Supreme Court reserved the right of any person to bring a challenge to the joint resolution "through a presentation of evidence in accordance with the Gingles' analysis of the Voting Rights Act." In re Senate Joint Resolution 2-G, 597 So. 2d at 285.

Because the Florida Supreme Court did not adjudicate Section 2 claims, the federal district court does not have to give full faith and credit to a judgment that did not

decide the issues before it. Haring v. Prosise, 462 U.S. 306, 313 (1983). For the same reasons, abstention under the Rooker-Feldman doctrine does not apply, because the district court is not reviewing an adjudication of Section 2 claims, but, rather, is deciding those issues for the first time. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

The Appellants' true complaint is that the DeGrandy Appellees brought their Section 2 challenge in federal court, rather than state court. The Appellants cannot, however, cite to this Court any decision holding that a plaintiff must bring a Section 2 action in state court. To the contrary, a plaintiff seeking redress under a federal cause of action has a right to pursue that claim in federal court -- a right that no state can abridge. Barrow v. Kane, 18 S. Ct. 526 (1898).

The lower court's decision to dismiss the Appellants' abstention argument was proper. When proceeding under 42 U.S.C. § 1983, a plaintiff may select either state or federal jurisdiction. The Appellees initiated this action concerning strictly federal constitutional and statutory issues on January 14, 1992, months prior to any state court proceeding. Although a state forum was available, the Appellees chose the federal forum instead. "[T]his Court has uniformly held that individuals seeking relief under 42 U.S.C. § 1983 need not present their federal constitutional claims in state court before coming into a federal forum." Zablocki v. Redhail, 434 U.S. 374, 379-380 n.5 (1977), citing Wisconsin v. Constantineau, 400 U.S. 433, 437-439 (1971); Zwickler v. Koota, 389 U.S. 241, 245-252 (1967); and Huffman v. Pursue, Ltd., 420 U.S. 592, 609-610 n.21 (1975).

Although not required to do so, the court below repeatedly deferred to state proceedings throughout the apportionment process.[29] Only after the State of Florida had a legally enforceable House plan, and Section 2 challenges were lodged against it, did the federal court exercise jurisdiction. At that point, no proceedings were pending in any state court concerning legislative apportionment, and the sole issue remaining was whether the existing, otherwise legally enforceable plan violated Section 2 of the Voting Rights Act. The federal district court had not only the right, but also the obligation, to entertain that federal claim at that time. 42 U.S.C. § 1973a. As this Court stated in New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 373 (1989):

> It is true that the federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future or, as in the present circumstances, even a pending state-court action. But there is no doctrine that the availability or even the pendency of a

[29] When the Appellees brought their action in federal court in January 1992, the federal court dismissed the complaint, holding that the state legislature should have more time to pass a plan of apportionment. Even after reluctantly accepting jurisdiction in March, the court emphasized that it was not enjoining any state redistricting proceedings. App. 12a. Thereafter, when the Legislature passed a Joint Resolution of apportionment on April 10, 1992, the federal court bifurcated its trial schedule, setting the trial on congressional redistricting first and delaying a hearing on state redistricting. When the Florida Supreme Court entered its order on the facial validity of the Joint Resolution, the federal court, on its own motion, stayed all proceedings concerning state legislative redistricting pending Section 5 review. Finally, despite numerous requests by the Appellees to lift the self-imposed stay and to begin trial during the preclearance process, the federal court refused, and deferred all action until the U.S. Attorney General issued his decision.

> state judicial proceeding excludes the federal courts. Viewed as it should be, as no more than a state-court challenge to completed legislative action, the Louisiana suit comes within none of the exceptions that Younger and later cases have established.

If the Court were to adopt the theory put forward by the Appellants under these facts -- that the mere presence of an alternative forum warrants abstention -- then a federal court would never be able to hear cases involving civil rights protected under the United States Constitution.

The Appellants claim that the decision in California Democratic Congressional Delegation v. Eu, 790 F. Supp. 925 (N.D. Cal. 1992), conflicts directly with this case[30]; however, the circumstances of that case clearly distinguish it from the case at bar. The California plaintiffs had filed their case with the California Supreme Court as permitted by the state constitution. Long before a case was filed in federal court, the California Supreme Court, through a Special Master, heard extensive evidence on the totality of the circumstances and had drawn a plan that was designed to meet any possible Voting Rights Act challenge. Wilson v. Eu, 823 P.2d 545 (Cal. 1992). By the time that the federal district court declined jurisdiction, the California Supreme Court had already produced maps and reached a final adjudication of the Voting Rights Act issue. If the

[30] The California case was a traditional "legislative deadlock" case accepted under the California Supreme Court's original jurisdiction in such circumstances. The instant case was a mandatory, but facial, review required before the redistricting scheme passed by the Florida Legislature could take effect. See Fla. Const. art. III § 16(c). Moreover, in California Democratic Congressional Delegation v. Eu, the state case was filed first.

district court there had exercised jurisdiction, it would have been in the position of an appellate court in violation of the Rooker-Feldman doctrine.[31] No such circumstances existed here because the Florida Supreme Court had expressly refused to adjudicate the Section 2 issues.

Finally, federal courts do not abstain or defer to a state court in an action that involves a person asserting the rights under the Voting Rights Act asserted here. 42 U.S.C. § 1973j(f) ("The district court . . . shall exercise [jurisdiction over Voting Rights Act cases] without regard to whether a person asserting rights under [the Act] shall have exhausted any administrative or other remedies that may be provided by law.")

IV. THE REMEDIAL HOUSE PLAN ADOPTED BY THE COURT BELOW FOLLOWED THE EQUITABLE STANDARDS SET BY THIS COURT.

After finding a violation of Section 2, the court below followed, as closely as practicable, this Court's remedial procedure for reapportionment of the state House. The remedial duty a court faces upon making a finding of Section 2 liability is, foremost, to "exercise its traditional equitable powers to fashion relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 208. In fashioning its

[31] Once the case had been decided by the California Supreme Court, the legislative policy of 28 U.S.C. § 2284 of providing rapid review and avoiding multiple stays by numerous courts would be better met by abstention and allowing any challenge of the California Supreme Court decision to be taken directly to this Court by certiorari.

remedy, the court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). A court cannot "authorize an element of an election proposal that will not with certitude completely remedy the Section 2 violation." Dillard v. Crenshaw County, 831 F.2d 246, 252 (11th Cir. 1987) (emphasis in original).

The appropriate standard for court remedial action was adopted in Wise v. Lipscomb, 437 U.S. 535, 540 (1978), which requires courts to defer to state legislatures in redrawing plans where practical. However, "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a plan pending later legislative action." Id. at 540. Here, the legislature had been unable to pass a reapportionment plan during its regular session. The reapportionment plan passed in the special session was approved by the state Senate by a margin of only one vote. Had a new plan been available, resubmission to the state Supreme Court and preclearance by the Attorney General would have been required. By the time the court made its finding of liability, filing for elections was less than two weeks away. Notwithstanding the late hour, the court granted the Appellants an opportunity to devise a plan. The Appellants' response was to submit a remedial plan that the court determined did not fully remedy the violation it had found. App. 68a-69a. In contrast, the Appellees proposed to the court a constitutionally appropriate plan that fully addressed and remedied the violation. Because this plan followed the spirit and the letter of the law, the court adopted the DeGrandy plan.

This Court elected to stay the court-imposed remedy based upon the Appellants' representations in their motions for stay. After full reflection on the record, however, this Court should endorse the remedial measures adopted by the court below as consistent with its equitable duty to eliminate racial vote dilution fully and completely. The 1994 elections should not be conducted under a reapportionment plan that has been found to violate Section 2.

CONCLUSION

For these reasons, the appeal should be dismissed or the judgment below summarily affirmed.[32]

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[32] The Appellees disagree with the United States' suggestion that this case be held pending this Court's decision in Voinovich v. Quilter, No. 91-1618. The issue of influence districts in that case is clearly distinguishable from the situation in south Florida. The amici who raise the influence issue in Voinovich assert that polarized voting is largely non-existent in Ohio, as are other elements of the totalities of the circumstances required to find a violation of Section 2 of the Voting Rights Act. 42 U.S.C. § 1973. See Brief Amici Curiae of Stokes, et al. In south Florida, the district court found extensive evidence of vote dilution that required a remedy. Had the DeGrandy plaintiffs been given an opportunity to present a remedial plan for the state Senate that addressed the findings of the district court (the court allowed the state House defendants such an opportunity), then this issue could have been avoided, because Plaintiffs assert that they can draw a remedial plan for the state Senate that preserves African-American voting strength.

Respectfully submitted,

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FILING CERTIFICATE

I hereby certify that on this 30th day of December, 1992, I filed 40 copies of a Motion to Dismiss or Affirm with the Clerk's Office of the Supreme Court of the United States via first class mail, postage prepaid. The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

I declare under penalty of perjury that the foregoing is true and correct.

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